

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

GEORGE HARMON,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 05-025

ORDER GRANTING SUMMARY
JUDGMENT

This matter comes before the Pollution Control Hearings Board on a summary judgment motion filed by the Respondent Washington State Department of Ecology (Ecology). Ecology seeks an order affirming a \$268,740 civil penalty issued to George Harmon for violations of the biosolids statute and regulations.

The Board was comprised of William H. Lynch, Chair, Kathleen D. Mix, and Andrea McNamara Doyle. Administrative Appeals Judge, Kay M. Brown presided for the Board. George Harmon initially had an attorney representing him in this appeal, but his attorney withdrew. Since then, Mr. Harmon represented himself. Nels Johnson, Assistant Attorney General, appeared for Respondent Ecology.

The Board reviewed and considered the following pleadings, which were submitted by the parties:

1. Notice of Appeal with attachments;
2. Pre-hearing Order;

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1 The Ecology representative also observed that there was sludge approximately 50 feet
2 from a creek that was on, or adjacent to, Mr. Harmon's property. This creek, named Malaney
3 Creek, is in the Oakland Bay watershed and flows into Northern Oakland Bay, a portion of Puget
4 Sound. *Declaration of Hoffman, Declaration of Meriwether.*

5 Wastewater treatment plant sludge is the end-product of wastewater treatment and
6 typically consists of slurry containing about 2 percent solids. It is not disinfected and contains
7 high levels of human pathogens including fecal coliform, bacteria, viruses, and intestinal
8 parasites. Material from septic tanks consists of settled human sewage along with any
9 nonbiodegradable plastics and materials that are flushed down toilets. Material from portable
10 toilets consists of fresh unsettled human sewage, often mixed with chemical disinfectant and
11 deodorizer.¹ *Declaration of Meriwether.*

12 During the January 15, 2004 inspection, the Mason County Sheriff's Office executed a
13 search warrant and took possession of Mr. Harmon's 2003 business records. Using these
14 records, along with additional records obtained from Bio-Recycling, a licensed bio-waste
15 treatment facility to which Mr. Harmon hauled biosolids/septage, it was determined that Mr.
16 Harmon had hauled approximately 767,646 gallons of biosolids/septage in 2003, and that he had
17

18 ¹ "Biosolids" means sewage sludge that meets applicable criteria and can be beneficially recycled, when properly
19 managed. RCW 70.95J.010; WAC 173-308-080. Biosolids can include material removed from portable toilets or
20 other similar holding systems if certain quality criteria are met. WAC 171-308-070 and -080. Here it is unknown if
21 that quality was met. For purposes of this decision, because Mr. Harmon dumped both wastewater treatment
(sewage) sludge and septage material of unknown quality, the term biosolids/septage will generally be used to refer
to that material.

1 illegally disposed of 496,306 gallons of this waste. The illegal dumping had occurred on 117
2 different days. *Declaration of O'Malley, Declaration of Hoffman.*

3 On January 15, 2004, Ecology notified the Department of Health about the
4 biosolids/septage dumped on Mr. Harmon's property. Because of the potential risk to public
5 health due to the proximity of Malaney Creek, the Department of Health immediately closed a
6 portion of Oakland Bay to shellfish harvesting. The closure was not lifted until January 23,
7 2004. *Declaration of Meriwether.*

8 On January 31, 2005, Ecology issued a civil penalty to Mr. Harmon in the amount of
9 \$268,740 for violations of the biosolids application rules contained in WAC Ch. 173-308.
10 Ecology calculated the amount of the penalty based on points allotted due to "gravity criteria"
11 that were either possibly, probably, or definitely present in the violations. Three of the gravity
12 criteria that Ecology found present in Mr. Harmon's violations were public health risk, failure to
13 obtain necessary permits, and economic benefit from noncompliance. Application of the gravity
14 criteria resulted in a total of 14 points. Under Ecology's enforcement guidelines, a violation
15 between 12 and 14 points results in a penalty of \$2,000. Ecology multiplied the \$2,000 per
16 violation, times the 117 days of calculated violations, with a resulting penalty of \$234,000.
17 Ecology then added the estimated direct economic benefit of noncompliance to Mr. Harmon
18 (\$34,740). This figure was based solely on saving the \$.07 per gallon tipping fee Mr. Harmon
19 would have had to pay to dispose of 496,306 gallons of biosolids/septage at a licensed biosolids
20 treatment facility. It did not reflect any savings from such things as reduced fuel use or payroll,

1 and avoided costs of permitting and other compliance measures. Adding \$34,740 to \$234,000
2 resulted in a penalty assessment of \$268,740. *Declaration of Hoffman, Declaration of Johnson.*

3 PROCEDURAL BACKGROUND

4 Mr. Harmon appealed the civil penalty to this Board on February 22, 2005. In his appeal,
5 he alleged that the penalty was based on incorrect facts, and asked that it be reversed.

6 *Declaration of Johnson, Notice of Appeal.*

7 A scheduling letter was sent by the Board's presiding officer setting a primary hearing
8 date for October 13 and 14, 2005, and a secondary hearing date for July 21 and 22, 2005. A pre-
9 hearing conference was scheduled for March 11, 2005, but postponed repeatedly until May 13,
10 2005, based upon the request of the parties. Mr. Harmon retained an attorney who appeared on
11 his behalf for the pre-hearing conference. Two issues were established for the hearing: (1)
12 whether Appellant violated the biosolids statute, regulations, and statewide permit, and (2)
13 whether Ecology's penalty is reasonable under the circumstances. *Declaration of Johnson,*
14 *Correspondence in the official file for PCHB No. 05-025.*

15 The hearing was subsequently continued to January 30 and 31, 2006. In July of 2005,
16 Mr. Harmon's attorney withdrew. Following the attorney's withdrawal, the Board's presiding
17 officer attempted to schedule two telephone conferences with the parties. Mr. Harmon failed to
18 answer either call. A telephone conference was arranged and successfully conducted on October
19 24, 2005. In that conference, Mr. Harmon indicated that he no longer wanted to contest the
20 occurrence of the violations due to the fact that he had been convicted in Mason County Superior

1 Court of unlawful disposal of biosolids.² His only remaining challenge was to the
2 reasonableness of the penalty amount. *Declaration of Johnson, Correspondence in the official*
3 *file for PCHB No. 05-025.*

4 On January 20, 2006, another telephone conference was conducted. The parties agreed to
5 continue the hearing date to June 7, 2006, and to reopen dispositive motion practice. On March
6 16, 2006, Ecology filed this motion for summary judgment on the reasonableness of the amount
7 of the penalty. Despite an extension of time, and explanations and emphasis on the importance
8 of filing a response, Mr. Harmon has not filed a response to the motion. *Declaration of Johnson,*
9 *Correspondence in the official file for PCHB No. 05-025.*

10 ANALYSIS

11 A. Summary judgment standard

12 I.

13 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
14 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
15 opposing party. *Jacobsen v. State*, 89 Wn. 2d 104, 108, 569 P.2d 1152, 1155 (1977). The party
16 moving for summary judgment must show there are no genuine issues of material fact, and the
17 moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co.,*
18 *Inc.*, 131 Wn. 2d 171, 182; 930 P. 2d 307, 313 (1997). A material fact in a summary judgment
19

20 ² Pursuant to WAC 371-08-510(1)(c), the Board takes official notice of Mr. Harmon's conviction, Mason County
21 Cause No. 04-9-1090-9, filed December 2, 2004. See WAC 371-08-510(1)(c).

proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P. 2d 1207, 1210 (1992). The trier of fact must construe the evidence and consider the material facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Weatherbee v. Gustafson*, 64 Wn. App. 128, 131, 822 P. 2d 1257 (1992). If the moving party is a respondent and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial. If, at this point, the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, then the trial court should grant the motion. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182, 187(1989).

II.

Here, Mr. Harmon has conceded that the violations occurred. The Board concludes that Ecology has put forth facts sufficient to meet its burden of proving the reasonableness of the civil penalty assessed in this matter. Mr. Harmon has offered no facts to controvert Ecology's evidence. Therefore, on the undisputed facts set forth in Ecology's motion for summary judgment, and the analysis set out below, the Board concludes the civil penalty assessed against Mr. Harmon is reasonable.

B. Reasonableness of the penalty

III.

The only issue in this appeal is whether the penalty assessed against appellant is reasonable under the facts and circumstances of this case. The purpose of civil penalties is to

1 influence behavior, promote compliance, and deter future violations, both by the violator and
2 others in the same occupation. *Douma v. Ecology*, PCHB No. 00-019 (March 30, 2005)(CL 22).
3 The Board considers three factors when reviewing the reasonableness of a penalty: (1) the
4 nature of the violations, (2) the prior behavior of the violator, and (3) the subsequent action taken
5 to rectify the situation. *Id.* at CL 19.

6 IV.

7 Ecology contends, and the Board agrees, that the nature of Mr. Harmon's violations were
8 extremely serious. The Legislature, when providing authority to Ecology to establish a program
9 to allow reuse of municipal sewage sludge, noted both the benefits and dangers in the use of
10 biosolids:

11 The Legislature finds that:

12 . . .

13 (d) Properly managed municipal sewage sludge is a valuable commodity and can be
14 beneficially used in agriculture, silviculture, and in landscapes as a soil conditioner; and

15 . . .

16 (e) Municipal sewage sludge can contain metals and microorganisms that, under certain
circumstances, may pose a risk to public health.

17 RCW 70.95J.005(1)(d) and (e). The Legislature goes on to direct Ecology to establish a program
18 that:

19 to the maximum extent possible, ensure[s] that municipal sewage sludge is reused as a
20 beneficial commodity and is managed in a manner that minimizes risk to public health
and the environment.

1
2 RCW 70.95J.005(2).

3 V.

4 The program established by Ecology is set out in WAC Ch. 173-308. The purpose of the
5 program is to allow beneficial use of biosolids while protecting human health and the
6 environment. WAC 173-308-010. Mr. Harmon violated many of the provisions of this chapter
7 including disposing of biosolids/septage without a permit (WAC 173-308-110, -310), failing to
8 keep the required records or file required reports (WAC 173-308-290, and -295), failing to take
9 appropriate measures to reduce pathogens in the biosolids/septage he disposed of on his property
10 (WAC 173-308-270), failing to restrict access to the contaminated site (WAC 173-308-270), and
11 failing to meet vector attraction³ reduction requirements (WAC 173-308-210, -220 and -270).

12 VI.

13 The Board views Mr. Harmon's violations as especially egregious because they involved
14 disposal of hundreds of thousands of gallons of biosolids/septage on the ground near Malaney
15 Creek and a wetland. The disposal in close proximity to water resulted in Washington State
16 Department of Health's closure of Oakland Bay to shellfish harvesting for over a week.
17 Indisputably, Mr. Harmon's actions had the potential to have a disastrous impact on human
18 health and the environment. *Declaration of Meriwether.*

19
20 ³ "Vector attraction" means "the primarily odorous characteristic of biosolids that attracts rodents, flies, mosquitoes,
21 or other organisms capable of transporting infectious agents." WAC 173-308-080.

VII.

The second factor the Board considers is the past behavior of the violator. Mr. Harmon has no prior biosolids violations; however the Board finds that the lack of past violations is more than offset by the seriousness of the current violations. *Engman v. Ecology*, PCHB No. 98-63 (Feb. 25, 1999)(CL 12). Further, Mr. Harmon's violations were willful and knowing. Mr. Harmon was informed and knowledgeable regarding biosolids and waste disposal. Mr. Harmon is a co-author of the Mason County Septic Tank Pumpers' manual, a guidance document for septic tank pumpers in Mason County which contains information on pathogens found in biosolids/septage and the consequences of improper waste disposal. *Declaration of Hoffman*. Thus, while Mr. Harmon was disposing of biosolids/septage on his property, he was presumably fully aware both of the seriousness of the violations and the significant threat to human health and the environment that his actions posed. The Board in the past has taken into account a violator's knowledge, and found that knowledge is a factor that offsets the lack of past violations in evaluating the reasonableness of a penalty. *Murphy v. Ecology*, PCHB No. No. 97-80 (February 4, 1998)(CL 9).

VIII.

The third factor the Board considers is any subsequent action taken to rectify the situation. Here, there is no indication in the record that Mr. Harmon made any efforts to remedy any aspect of the violations, either by attempting to clean up the remainder of the unlawfully dumped waste or, minimally, to sign or fence the hazardous area. Indeed, it appears there was

1 very little that could be done to mitigate the effects of a year-long practice of dumping
2 biosolids/septage on the ground near a creek and wetlands. The hundreds of thousands of
3 gallons of biosolids/septage deposited on the ground have likely been washed to some extent into
4 the creek, wetland, and Oakland Bay, and have certainly been absorbed into the ground, and
5 possibly the groundwater. *Declaration of Meriwether*. Like smoke from unlawful field burning
6 which cannot be eliminated once released, the biosolids/septage Mr. Harmon dumped on the
7 ground has been released into the environment and also cannot be eliminated. *See Ted*
8 *Rasmussen Farms, LLC v. Ecology*, PCHB No. 01-174, (Order Granting Summary Judgment and
9 Dismissal, June 27, 2002)(CL 27)(“The parties agree this type of violation cannot be corrected,
10 because no steps may be taken to erase the emissions, which escaped into the air.”), *Reversed on*
11 *other grounds*, 127 Wn. App. 90, 110 P.3d 823 (2005).

12 IX.

13 The Board concludes that Ecology engaged in a reasonable analysis in the penalty
14 calculation as well. Ecology assessed the penalty based only on the 117 days that
15 biosolids/septage was actually dumped illegally. Ecology could have assessed a penalty based
16 on each day of the ongoing violation—up to 365 days in this case. Another factor in reviewing
17 the reasonableness of a penalty is whether the agency has set the penalty below the maximum
18 authorized by law. *Kaiser Aluminum & Chemical Corporation v. Ecology*, PCHB No. 99-121 &
19 135 (May 17, 2000)(CL 8). Statutorily, Ecology has the authority to impose a penalty of up to
20 \$5,000 a day for each day of continuing violation. RCW 70.95J.070. Here, Ecology imposed

1 considerably less than the maximum per day amount. Ecology was also conservative in its
2 assessment of the direct economic benefit to Mr. Harmon, including only the savings on the
3 disposal fee that Mr. Harmon would have had to pay to dispose of the biosolids/septage legally.
4 This estimate did not reflect other savings from reduced fuel use or payroll, or avoided costs of
5 permitting and compliance.

6 X.

7 The Board concludes that, based on the uncontroverted evidence set forth by Ecology,
8 that the penalty is reasonable given the facts and circumstances of this case. Based on Mr.
9 Harmon's illegal actions, taken deliberately over a period of time, with full knowledge of the
10 potential for serious impact to both the public health and the natural environment, the \$268,740
11 penalty assessed by Ecology is reasonable.

12 Based on the foregoing analysis, the Board enters the following

13 ORDER

14 Respondent Ecology's summary judgment motion is granted, the civil penalty issued
15 against Mr. Harmon in the amount of \$268,740 is affirmed, and Mr. Harmon's appeal is
16 dismissed.

17 DONE this 2nd day of June 2006.

18 POLLUTION CONTROL HEARINGS BOARD

19 William H. Lynch, Chair

20 Kathleen D. Mix, Member

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Andrea McNamara Doyle, Member

Kay M. Brown, Presiding
Administrative Appeals Judge